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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

## USA COMMERCIAL MORTGAGE COMPANY,

## USA CAPITAL REALTY ADVISORS, LLC.

**USA CAPITAL DIVERSIFIED TRUST  
DEED FUND, LLC**

**USA CAPITAL FIRST TRUST DEED  
FUND LLC**

USA SECURITIES LLC

## Debtors.

### Affects:

- All Debtors
  - USA Commercial Mortgage Company
  - USA Capital Realty Advisors, LLC
  - USA Capital Diversified Trust Deed Fund, LLC
  - USA Capital First Trust Deed Fund, LLC
  - USA Securities, LLC

Case No. BK-S-06-10725-LBR  
Case No. BK-S-06-10726-LBR  
Case No. BK-S-06-10727-LBR  
Case No. BK-S-06-10728-LBR  
Case No. BK-S-06-10729-LBR

CHAPTER 11

Jointly Administered Under Case  
No. BK-S-06-10725-LBR

**Reply in Support of Motion For  
Summary Judgment Regarding (1)  
Responses To The USACM Liquidating  
Trust's First Through Thirty-Third  
Omnibus Objections To Claims Asserting  
A Secured Status; (2) Responses to  
USACM Trust's First Through Third  
Omnibus Objections To Claims Asserting  
A Priority Status; And (3) Newly Alleged  
Secured And Priority Claims**

**Hearing Date: October 15, 2007  
Time: 9:30 a.m.**

The USACM Liquidating Trust (the “USACM Trust”) files this Reply in Support of its pending Motion for Summary Judgment (the “Motion”) [DE 4291]. The Motion challenges Direct Lender claims that wrongly assert secured and/or priority status and requests that the Court re-designate those claims as general unsecured claims. The Motion does not, as some of the claimants apparently fear, threaten Direct Lender interests in deeds of trust or mortgages granted by borrowers to secure loans brokered by USACM.

1           **I. INTRODUCTION**

2           The vast majority of Direct Lender claimants affected by the Motion did not oppose  
 3 it, but the following nine claimants (the “Claimants”) did:

- 4           1. John Dutkin, Trustee of the John Dutkin Revocable Living Trust  
             Dated 1/17/00 (“Dutkin Trust”), Claim No. 10725-01395;
- 5           2. Joanne M. Grundman, Claim No. 10725-01544;
- 6           3. Erna D. Grundman, Claim No. 10725-01542;
- 7           4. Edward Kline And Leah Kline Family Trust (“Kline Family Trust”),  
             Claim No. 10725-00547;
- 8           5. Edward Kline, Claim No. 10725-00572;
- 9           6. Michael Petersen, Claim Nos. 10725-00754 and 01470;
- 10          7. Larry L. Rieger and Patsy R. Rieger Revocable Trust Dated 8/14/91  
             (“Rieger”), Claim No. 10725-01739;
- 11          8. Jack S. Tiano, Claim No. 10725-00391, 01831 and 01832; and
- 12          9. Osvaldo Zunino, Claim No. 10725-02548;

15           The USACM Trust files herewith a Supplemental Statement of Facts (“SSOF”).  
 16           The SSOF attaches as exhibits each Claimant’s Proof(s) of Claim and includes additional  
 17           facts related to each claim. The SSOF is supported by declarations from Geoffrey Berman  
 18           and Susan Smith responding to certain Claimants’ allegations. Below, in Section II, the  
 19           USACM Trust summarizes the undisputed facts related to each Claimant and replies to the  
 20           specific arguments raised by each Claimant.

21           Before analyzing each claim specifically, however, the USACM Trust will address  
 22           an argument raised by almost all of the Claimants: that USACM’s alleged fraud created a  
 23           perfected security interest for them in USACM’s real or personal property. Although  
 24           several of the claimants are represented by counsel, not one of them explains how  
 25           USACM’s alleged fraud could give rise to a lien, much less a perfected security interest.  
 26           Not one of them cites a single case or even a rule that supports that proposition.

27           Claimants’ fraud argument, without more, is not sufficient to defeat the Motion.  
 28           The USACM Trust has established with the Declaration of Geoffrey Berman that based on

1 USACM's records and UCC searches there was neither a security interest or a priority  
 2 claim created in favor of any Claimant (Statement of Facts filed at DE 4293 ("SOF") ¶ 15.)  
 3 Thus, the burden shifted to Claimants to present specific facts and law showing that there  
 4 is a genuine issue for trial.<sup>1</sup> The non-moving party "may not rely on denials in the  
 5 pleadings but must produce specific evidence, through affidavits or admissible discovery  
 6 material, to show that the dispute exists."<sup>2</sup> Having offered no facts or law to prove up their  
 7 secured and/or priority claims, Claimants have failed to meet their burden on summary  
 8 judgment.

9 Not only does the fraud argument fail because Claimants offer no facts or law to  
 10 support it, but also because USACM has no real or personal property in which Claimants  
 11 could take a security interest. (SSOF ¶¶ 1-3.) USACM has no personal property that  
 12 would be the subject of a perfected security interest established by a security agreement  
 13 and a corresponding UCC-1 filing. (SSOF ¶ 2.) USACM has searched the records of the  
 14 Nevada Secretary of State and confirmed there are no UCC-1's on file. (SSOF ¶ 3.) On  
 15 the petition date, USACM did not hold an interest in any of the loans in which Claimants  
 16 had investments. (SSOF ¶ 4.)

17 Ultimately, Claimants seek to improperly secure a higher priority in the bankruptcy  
 18 to the detriment of other similarly situated Direct Lenders. The Court should grant the  
 19 Motion as to all claims referenced in Exhibits A and B to the Motion and re-designate  
 20 those claims as general unsecured claims (but subject to further objection).

## 21 II. REPLIES TO INDIVIDUAL CLAIMANTS

### 22 A. DUTKIN TRUST, CLAIM NO. 10725-00139

#### 23 1. Undisputed Facts

24 The Court can find the Dutkin Trust's Response at DE 4628. According to its Proof  
 25 of Claim, the Dutkin Trust asserts a \$56,120.90 secured claim in the "assignment of  
 26 interest in Deeds of Trust". (SSOF ¶ 5). The Dutkin Trust had a Direct Lender investment

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 28 <sup>1</sup> *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055-56 (9<sup>th</sup> Cir. 2002).

<sup>2</sup> *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9<sup>th</sup> Cir. 1991).

1 in two loans totaling \$56,120.90. (*Id.*) Both loans were secured by deeds of trust executed  
 2 by the borrowers. (Dutkin Trust Response [DE 4628], p. 3.)

3       In early 2006, the Dutkin Trust asked USACM to cash out its Direct Lender  
 4 investments. (Dutkin Trust Response [DE 4628], p. 2-3.) In response, USACM sent the  
 5 Dutkin Trust three separate documents entitled “Assignment of Beneficial Interest in Deed  
 6 of Trust” (the “Assignments”) with instructions to sign, notarize and return them. (Dutkin  
 7 Trust Response [DE 4628], p. 3.) On March 23, 2006, the Dutkin Trust, through its  
 8 trustee, executed the Assignments and returned them to USACM, thereby releasing its  
 9 security interest in the real property that secured its investments. (Assignments, attached  
 10 as pages 9 -15 to the Dutkin Trust Response [DE 4628].) The Assignments, however, did  
 11 not assign the Dutkin Trust’s interest to USACM, but to other Direct Lenders as follows:

- 12       10.      A \$25,000 interest in the deed of trust securing the Fiesta  
                   USA/Stoneridge Loan to Howard and Lorene Connell;
- 13       11.      A \$25,000 interest in the deed of trust securing the Fiesta  
                   USA/Stoneridge Loan to Jean Jacques Berthelot, Trustee of the  
                   Berthelot Living Trust dated 4/9/03;
- 14       12.      A 100% interest in the Dutkin Trust’s investment in a mortgage  
                   executed by Brookmere, LLC and Lord & Essex Matteson, LLC. to  
                   First Trust Company of Onaga Custodian for Karen S. Moberly IRA  
                   (this related to the Brookmere/Matteson loan).

15       *(Id.)* Accordingly, from the face of the Assignments it is apparent that USACM has no  
 16 interest now and has never had any interest in the Assignments in which the Dutkin Trust  
 17 now claims a security interest. (*Id.*)

18       In exchange for the Assignments, USACM issued and mailed three checks to the  
 19 Dutkin Trust: (1) a \$25,000 check dated March 27, 2006; (2) a \$25,000 check dated  
 20 March 30, 2006 for \$25,000; and (3) a \$6,120.90 check dated April 5, 2006. (Dutkin Trust  
 21 Response [DE 4628], p. 3.) Three weeks after the last check was issued, the Dutkin Trust  
 22 deposited all three checks at its bank on April 26, 2007, and they were returned unpaid.  
 23 (*Id.*); presumably because USACM had in the interim filed its bankruptcy petition on  
 24 April 13, 2007.

1                   **2.       The Dutkin Trust Does Not Have a Secured Claim**

2                   The Dutkin Trust claims a security interest in the Assignments it executed because  
 3 USACM procured them through fraud. (Dutkin Trust Response [DE 4628], pp. 3 – 4.)  
 4 Although represented by counsel, the Dutkin Trust makes no effort to explain how  
 5 USACM’s alleged fraud could give the Dutkin Trust a security interest in the Assignments  
 6 even though USACM did not hold any interest in the Assignments on the petition date;  
 7 rather the Dutkin Trust assigned its interests to other Direct Lenders. For this reason and  
 8 for the reasons discussed above in Section I, the Dutkin Trust’s claim to a security interest  
 9 in the Assignments fails as a matter of law.

10                  **B.       JOANNE M. GRUNDMAN, CLAIM NO. 10725-01544**

11                  **1.       Undisputed Facts**

12                  The Court can find Joanne Grundman’s Response at DE 4492. Section 4 of Joanne  
 13 Grundman’s Proof of Claim asserts a \$50,000 secured claim in real estate and states that at  
 14 the time the case was filed the amount of arrearages included within the secured claim was  
 15 \$4,818.08. (SSOF ¶ 6.) Inconsistent with Section 4, Section 5 of the Proof of Claim  
 16 asserts a \$50,000 secured claim, plus a \$4,818.08 priority claim that was not listed in  
 17 Section 4. (*Id.*) The supporting documentation to the Proof of Claim and Joanne  
 18 Grundman’s Response [DE 4492] indicate that she had one \$50,000 Direct Lender  
 19 investment in the Fiesta Oak Valley Loan. (*Id.*) Nothing in the Proof of Claim or its  
 20 supporting documentation would suggest that she had a perfected security interest in  
 21 collateral owned by USACM or a priority claim. (*Id.*)

22                  Joanna Grundman’s one page Response to the Motion asserts that USACM  
 23 defrauded her through its handling of the Fiesta Oak Valley Loan. More specifically, she  
 24 alleges that USACM extended the loan even though it was not performing and did not tell  
 25 the Direct Lenders. She also asserts that USACM was an investor in the Fiesta Oak Valley  
 26 Loan. Based upon this alleged fraud, her Response asserts that she is entitled to a secured  
 27 claim in unspecified collateral and a priority claim under “US Bankruptcy Code,  
 28 Chapter 11, Subsection 507.10(b).”

1                   **2.       Joanna Grundman Does Not Have a Secured Claim or a Priority  
2                   Claim**

3                   As explained in Section I above, Ms. Grundman's amorphous fraud allegations are  
4                   insufficient to survive summary judgment. Also, Ms. Grundman offers no evidence to  
5                   suggest that her Direct Lender investment was secured by real or personal property owned  
6                   by USACM on the petition date. USACM held no interest in the Fiesta Oak Valley Loan  
7                   on the petition date (SSOF ¶ 4). Ms. Grundman cannot have a perfected security interest  
8                   in something that does not exist.

9                   Ms. Grundman asserts a priority claim under "US Bankruptcy Code, Chapter 11,  
10                  Subsection 507.10(b)". Although there is a Section 507 and it does govern priority claims,  
11                  there is no Subsection 10(b). Thus, Ms. Grundman's argument is unclear. That said,  
12                  Section 507 plainly does not apply in Ms. Grundman's case.

13                  **C.     ERNA D. GRUNDMAN, CLAIM NO. 10725-01542**

14                  **1.     Undisputed Facts**

15                  Erna Grundman filed a joint Response to the Motion along with Joanne Grundman.  
16                  The Court can find that Response at DE 4492. The Response only references Joanne  
17                  Grundman's claim, Claim No. 10725-01544, but seems intended to also cover Erna  
18                  Grundman's claim, Claim No. 10725-01542. Accordingly, the USACM Trust will  
19                  construe the Grundmans' Joint Response to cover Edna Grundman's claim even though it  
20                  is not referenced there.

21                  Section 4 of Erna Grundman's Proof of Claim asserts an unsecured priority claim in  
22                  the amount of \$7,872.22. (SSOF ¶ 7.) Inconsistent with Section 4, Section 5 of the Proof  
23                  of Claim lists a \$7,872.22 priority claim and a \$10,038.89 secured claim not referenced in  
24                  Section 4. (*Id.*) The documentation attached to the Proof of Claim gives no suggestion  
25                  that Erna Grundman is entitled to a secured claim or a priority claim. (*Id.*) Rather, the  
26                  documentation indicates that, at the time USACM filed its bankruptcy petition, Erna  
27                  Grundman had one \$7,341.77 direct lender investment in the Fiesta Oak Valley Loan.  
28                  (*Id.*) The Proof of Claim gives no basis for Ms. Grundman's priority or secured claims.

1 (Id.) Obviously, the creditor has not attempted to identify any collateral to which a  
 2 perfected lien attaches.

3                   **2. Erna Grundman Does Not Have a Secured or Priority Claim**

4                   Erna Grundman's assertion of secured and priority claim status fails for the same  
 5 reasons that Joanna Grundman's fails. *See Section II.B above.*

6                   **D. KLINE FAMILY TRUST, CLAIM NO. 10725-00547**

7                   **1. Undisputed Facts**

8                   Section 4 of the Kline Family Trust Proof of Claim assets a \$100,000 secured claim  
 9 in real estate. (SSOF ¶ 8.) Inconsistent with Section 4, Section 5 of the Proof of Claim  
 10 asserts a \$105,060 secured claim. (Id.) The supporting documentation filed with the Proof  
 11 of Claim indicates that the Kline Family Trust had one \$100,000 Direct Lender investment  
 12 in the Margarita Annex Loan. (Id.) Obviously, the creditor has not attempted to identify  
 13 any collateral to which a perfected lien attaches.

14                  Edward Kline filed two responses to the Motion [DE 4508 and 4509] that both  
 15 make essentially the same arguments. Both also state that they relate to Claim No. 10725-  
 16 00572, which is not the Kline Family Trust's claim number. The Response filed at  
 17 DE 4508, however, references the Margarita Annex Loan and, therefore, the USACM  
 18 Trust is construing this Response as an opposition to the Motion related to the Kline  
 19 Family Trust Claim, No. 10725-00547.

20                  **2. The Kline Family Trust Does Not Have a Secured Claim**

21                  As a threshold matter, Mr. Kline takes issue with the USACM Liquidating Trust's  
 22 appointment of Geoffrey Berman as Trustee. Mr. Kline's criticism is misplaced.  
 23 Mr. Berman was validly appointed. The Trustee was designated by notice of filing the  
 24 USACM Committee's Plan Documents Supplement and Disclosure with Liquidating Trust  
 25 Agreement [DE 2002]. The Plan was confirmed without objection on this point.<sup>3</sup> The  
 26 Plan became effective.<sup>4</sup> On April 4, 2007, the Trust Agreement making Mr. Berman the

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27                  <sup>3</sup> Order Confirming the Debtor's Third Amended Joint Plan of Reorganization [DE 2376].

28                  <sup>4</sup> Notice of Effective Date of Confirmed Plan [DE 3083].

1 Trustee was filed with this Court.<sup>5</sup> Simply put, Mr. Berman was validly appointed as the  
 2 Trustee for the USACM Trust after notice and a hearing, without objection, and upon the  
 3 Court's approval.

4           The Kline Family Trust's Response [DE 4508] at page 2, asserts that USACM  
 5 committed fraud by not disclosing certain information to Direct Lenders and "transferring  
 6 property." The Response does not include any supporting declarations and the only  
 7 documents attached to it appear to show that the Kline Family Trust made a \$100,000  
 8 investment in the Margarita Annex Loan and that USACM made some representations  
 9 regarding its handling of that loan. As explained above in Section I, such fraud allegations  
 10 do not create a security interest in collateral owned by USACM.

11           **E. EDWARD KLINE, CLAIM NO. 10725-00572**

12           **1. Undisputed Facts**

13           The Court can find Mr. Kline's Response at DE 4508. Section 4 of Mr. Kline's  
 14 Proof of Claim asserts a \$100,000 secured claim in real estate. (SSOF ¶ 9.) Inconsistent  
 15 with Section 4, Section 5 of the Proof of Claim asserts a \$105,600 secured claim. (*Id.*)  
 16 The supporting documentation indicates that Edward Kline had one \$100,000 direct lender  
 17 investment in the Foxhill 216, LLC Loan. (*Id.*) The supporting documentation indicates  
 18 that this investment was secured by a deed of trust in property owned by Foxhills Fresno  
 19 Lough, LLC. (*Id.*) He did not identify any collateral in which he has a perfected lien.

20           **2. Kline Does Not Have a Secured Claim**

21           Mr. Kline's Response argues that USACM's fraudulent handling of the Foxhill 216,  
 22 LLC Loan created a security interest in his favor. As explained in Section I above, that  
 23 fraud argument has no merit.

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24  
 25  
 26  
 27           <sup>5</sup> Notice of Filing: Estate Administration and Liquidating Trust Agreement and Declaration  
 28 of the Trust by and Among USA Commercial Mortgage Company, Debtor and Geoffrey L.  
 Berman, as Liquidating Trustee [DE 3335].

1                   **F. MICHAEL PETERSEN, CLAIM NOS. 10725-00754 AND 01470**

2                   **1. Undisputed Facts**

3                   Michael Petersen filed the identical Response twice at DE 4571 and 4612.

4                   Mr. Petersen also filed the identical Proof of Claim twice, Proof of Claim Nos. 10725-  
 5                   00754 and 01470. (SSOF 10.) Both assert a \$1,500,000 secured claim in the “proceeds  
 6                   from the sale of the Tanamera Apartments, Reno, Nevada.” (*Id.*) The only supporting  
 7                   documentation included with either Proof of Claim is a transmittal letter from  
 8                   Mr. Petersen’s attorney, Michael O’Reilly, which gives no further information about the  
 9                   claim. (*Id.*) It does not identify any property in which he has a perfected lien. (*Id.*)

10                  **2. Michael Petersen Does Not Have a Secured Claim**

11                  Although represented by counsel, Mr. Petersen’s Response cites no supporting legal  
 12                  authority that would explain how he obtained a perfected security interest in USACM  
 13                  owned property. Rather, the Response asserts that USACM did not offer sufficient  
 14                  evidence with the Motion to overcome even Mr. Petersen’s Proof of Claim.

15                  Since the Petersen Proof of Claim includes no supporting documentation  
 16                  whatsoever, that argument is disingenuous. The USACM Trust carried its burden of  
 17                  production with a Declaration from Geoffrey Berman establishing that USACM has no  
 18                  record of Mr. Petersen having a security interest in any of USACM’s property.  
 19                  (SOF ¶ 15). Moreover, there is no evidence in the Nevada public record that Mr. Petersen  
 20                  held a security interest in USACM’s personal property. (SSOF ¶ 3.)

21                  Accordingly, the burden shifted on summary judgment to Mr. Petersen to come  
 22                  forward with evidence to support his claim. Mr. Petersen has not even tried to carry this  
 23                  burden, instead arguing that the Court must summarily dismiss Berman’s declaration  
 24                  because it is “self-serving”. (Petersen Response, p. 3.) The argument is nonsensical.  
 25                  Were the mere cry that a declaration is “self serving” enough to defeat a motion for  
 26                  summary judgment then no court would ever grant such a motion. The Response includes  
 27                  a declaration from Mr. Petersen, but it does nothing to rebut the Berman Declaration. In  
 28                  sum, the Petersen Declaration indicates that USACM told Mr. Petersen his direct lender

1 investment would be secured; that he believed it was secured by collateral equal to or  
 2 greater than his investment; and that he never received any indication that he had given up  
 3 his security interest.

4 Taking Mr. Petersen's assertions as true, the Petersen declaration is not enough to  
 5 survive summary judgment. Nothing Mr. Petersen says in his declaration is sufficient to  
 6 create a security interest in USACM's property, much less a perfected lien in any specific  
 7 property. Mr. Petersen presumably held a security interest as a Direct Lender in the form  
 8 of an interest in a deed of trust in the borrower's property, but he never obtained a security  
 9 interest in USACM's property. At most, Mr. Petersen is alleging that USACM defrauded  
 10 him. As explained in Section I, such fraud allegations are insufficient to establish a  
 11 perfected security interest.

## 12           **G. RIEGER, CLAIM NO. 10725-01739**

### 13           **1. Undisputed Facts**

14           Rieger filed Proof of Claim No. 10725-01739. (SSOF ¶ 11.) Rieger asserts a  
 15 \$260,008.00 general unsecured claim and a \$32,844 priority claim. (*Id.*) The Motion  
 16 challenges only the priority claim. Rieger's priority claim is based upon allegations of  
 17 post-petition misconduct by USACM related to the Amesbury Hatters Point loan. (*Id.*)  
 18 More specifically, Rieger asserts in its one page Response [DE 4548] that USACM  
 19 breached its fiduciary duties by granting a release of collateral securing the Amesbury  
 20 Hatters Point loan without obtaining principal repayment of the loan in return.

21           The facts with regard to USACM's post-petition handling of the Amesbury Hatters  
 22 Point Loan are undisputed (explained in the declaration of Susan M. Smith attached to the  
 23 SSOF as Exhibit 9) and are as follows. On June 9, 2006, USACM filed its "Motion for  
 24 Authority to Forbear and to Provide Further Funding for Certain Outstanding Loans"  
 25 (SSOF ¶ 12.) The motion was served upon Rieger. (SSOF ¶ 14.) The motion sought this  
 26 Court's authorization to issue partial releases for three Amesbury Condominium Units (the  
 27 "Amesbury Units") in exchange for the net proceeds from the sale of the units.  
 28 (SSOF ¶ 13.)

1           By order dated July 18, 2006, the Court granted the motion in relevant part and  
 2 expressly authorized USACM to consent to the sale of the Amesbury Units. (SSOF ¶ 15.)  
 3 Pursuant to the Court's order, USACM issued partial releases for the Amesbury Units in  
 4 exchange for the net sales proceeds from the Amesbury Units, which totaled  
 5 \$1,409,131.90. (SSOF ¶ 16.)

6           **2. Rieger Does Not Have a Priority Claim As a Matter of Law**

7           Rieger's one-page Response [DE 4548] states that Rieger's opposition to the  
 8 Motion is based upon the documentation attached to the Proof of Claim. The Response  
 9 further states that the basis for the claim is that USACM made post-petition releases of  
 10 collateral (the Amesbury Units) on a non-performing loan without collecting principal  
 11 repayments from the borrower. A November 10, 2006 letter from Riegers attached to the  
 12 Proof of Claim echoes this claim, stating that USACM breached its fiduciary duties "by  
 13 releasing collateral on the Amesbury Hatters Point loan without collecting principal  
 14 payments in exchange for the lien releases." (SSOF ¶11.) Further, that letter states that  
 15 the post-petition claim is based upon USACM's release of "three units". (SSOF ¶ 11).

16           Rieger misstates or ignores several critical facts that are beyond dispute: (1) the  
 17 Court, after notice and a hearing, authorized USACM to release the Amesbury Units in  
 18 exchange for the sale proceeds; (2) USACM received the sale proceeds; and (3) Rieger's  
 19 share of the sale proceeds was credited against prepaid interest Rieger owed USACM  
 20 pursuant to the Confirmed Plan. USACM was entitled to release the Amesbury Units for  
 21 sale and apply the sale proceeds in this fashion because it had the Court's permission to do  
 22 so. Accordingly, Rieger does not have a priority claim.

23           Rieger may argue that Rieger did not receive any of the sale proceeds. That is  
 24 incorrect. Although Rieger did not receive cash from the sale, Rieger benefited because  
 25 USACM applied Rieger's share of the net proceeds to reduce USACM's claim for prepaid  
 26 interest against Rieger. More specifically, as of March 10, 2006, Rieger had received  
 27 \$22,873.96 in prepaid interest with respect to their Direct Lender interest in the Amesbury  
 28 Loan. (SSOF ¶ 17.) In addition to the prepaid interest owed by Rieger for the Amesbury

1      Loan, Rieger also owed USACM the following amounts of prepaid interest as of  
 2      September 20, 2006: \$23,695.79 for the Fiesta Stoneridge Loan, \$8,756.95 for the Marquis  
 3      Hotel Loan, \$16,430.48 for the Fiesta Oak Valley Loan, \$7,058.65 for the Shamrock  
 4      Tower Loan, \$7,837.44 for the Placer Vineyards Loan, and \$16,240.00 for the HFA-Clear  
 5      Lake Loan. (SSOF ¶ 19.)

6                  Rieger's share of the net sales proceeds for the Amesbury Units was \$29,722.67.  
 7      (SSOF ¶ 18.) As authorized by the Confirmed Plan, USACM offset the prepaid interest  
 8      owed by Rieger on the Amesbury Loan against the sale proceeds, which left a remaining  
 9      balance of \$6,848.72. (SSOF ¶¶ 20 and 22.) (Confirmed Plan, Section I(A)(113) on page  
 10     17 and Section IV(E)(1)(d)(ii) on page 52.) Consistent with the Confirmed Plan, USACM  
 11     then applied the remaining balance of \$6,848.72 to a portion of the additional prepaid  
 12     interest owed by Rieger to USACM on the six additional loans referenced in the preceding  
 13     paragraph. (*Id.*) USACM's application of the funds from the sale of the Amesbury Units  
 14     was also consistent with the promissory note signed by the borrower, which provided: "All  
 15     payments received will be applied (a) first, to any of the following then due and payable in  
 16     such order and manner as the Lender in its sole discretion shall determine: fees, charges,  
 17     costs, expenses, late fees, interest, or principal and (b) second, to the outstanding Loan  
 18     Amount." (SSOF ¶ 21.)

19                The net sales proceeds from the sales were not lost, misappropriated or misappropriated  
 20     by USACM after the Petition Date. Rieger benefited from the sale of the Amesbury Units  
 21     by the \$29,722.67 reduction to the total prepaid interest amount owed by Rieger to  
 22     USACM. (SSOF ¶¶ 22 and 23.) USACM acted pursuant to the Amesbury Order in selling  
 23     the units and pursuant to the Confirmed Plan and the Amesbury Note in applying the net  
 24     proceeds received from the sale. (SSOF ¶ 22.) Rieger has no basis for any administrative  
 25     or priority claim against USACM.

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1                   **H. JACK TIANO, CLAIM NOS. 10725-00391, 01831 and 01832.**

2                   **1. Undisputed Facts**

3                   The Court will find Mr. Tiano's Response at DE 4472. Mr. Tiano's response does  
 4 not indicate to which claim it relates. Mr. Tiano personally filed one claim, Claim  
 5 No. 10725-00391. (SSOF ¶ 24.) However, there are two other claims filed by "Jack S.  
 6 Tiano, Accountancy Corp.", Claim Nos. 10725-01831 and 01832. (*Id.*)

7                   Jack Tiano's Proof of Claim No. 10725-00391 asserts a \$10,574 secured claim in  
 8 real estate. (*Id.*) Proof of Claim No. 10725-01831 asserts a \$56,673.28 secured claim in  
 9 real estate. (*Id.*) Proof of Claim No. 10725-01832 asserts a \$53,389.12 secured claim in  
 10 real estate. (*Id.*) The basis for Mr. Tiano's assertion of secured claim status against  
 11 USACM is unclear from the supporting documentation attached to his Proofs of Claim.  
 12 (*Id.*) Obviously, the creditor has not attempted to identify any collateral to which a  
 13 perfected lien attaches.

14                   **2. Tiano Does Not Have a Secured Claim As a Matter of Law**

15                   Mr. Tiano's Response states that USACM diverted principal and interest payments  
 16 owed to the Direct Lenders. In other words, he asserts that he has a security interest in  
 17 USACM's property based upon allegations of fraud. As discussed in Section I,  
 18 Mr. Tiano's fraud allegations do not establish a security interest. He has a general  
 19 unsecured claim.

20                   **I. OSVALDO ZUNINO, CLAIM NO. 10725-02548**

21                   **1. Undisputed Facts**

22                   The Court will find Mr. Zunino's Response to the Motion at DE 4627.  
 23 Mr. Zunino's Proof of Claim asserts a \$620,000 secured claim in real estate. (SSOF ¶ 25.)  
 24 The documentation supporting the Proof of Claim indicates that Mr. Zunino held direct  
 25 lender investments in six different USACM loans. (*Id.*) He did not identify any specific  
 26 property in which he alleges a perfected lien.

## **2. Zunino Does Not Have a Secured Claim as a Matter of Law**

Mr. Zunino's two sentence Response [DE 4627] indicates that he wants a secured claim because if the Court does not grant his claim secured status he will not recover all of the unpaid principal and interest due him from USACM. Mr. Zunino does not explain why the law entitles him to a secured claim. It does not. Mr. Zunino's Response does not meet the burden necessary to survive summary judgment.

### III. CONCLUSION

None of Claimants comes close to carrying their burden on summary judgment. They offer no facts or law that would establish that they have a secured or priority claim. There is no public record showing that any of the claimants had a security interest in USACM property. Indeed USACM owns no property in which Claimants could hold a security interest. Claimants like the other similarly situated Direct Lenders, have general unsecured claims.

Accordingly, the USACM Trust requests that the Court enter summary judgment reclassifying the claims identified in **Exhibit A** and **Exhibit B** to the Motion as general unsecured claims subject to possible additional objections.

Dated September 14, 2007.

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27 By /s/ Renee L. Creswell